SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 212

A. S. GENECOV,
Petitioner and Appellant Below,

vs.

STATE OF TEXAS AND R. A. SCHMIDT, SHERIFF, DALLAS COUNTY,
Respondent and Appellees Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Court Below

The opinion in the Supreme Court of Texas is reported in 186 S. W. 2d 225 and is found on page 306 of the record where said opinion is copied.

Jurisdiction

1. The date of the judgment of the Supreme Court of Texas to be reviewed is March 14, 1945, with motion for rehearing being overruled on April 11, 1945. This judgment is a final judgment by the highest court in the State of Texas in which a decision could be had.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. 344 b, and Supreme Court Rule 38, paragraph 5.

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on the writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph." (28 U. S. C. 344 b.)

3. The Federal Constitutional questions raised are properly preserved and were set out succinctly in paragraph 4 of petitioner's petition for rule of habeas corpus in the Texas Supreme Court (R. pp. 2-6) as follows:

> "That said restraint and imprisonment of your petitioner are illegal and in violation of the Constitution of the United States, and the Constitution and Laws of the State of Texas in that:
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> • • • • • • •

Your petitioner would further show that in the creation of said Salt Water Control Board, and the enforcement of said general plan for the disposal of salt water and the judgment in contempt, that your petitioner is being deprived of due process of law, and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

• • • • • • •

(h) The Honorable District Court abused his discretion in entering said judgment in contempt, because said judgment is based upon no evidence whatsoever showing any overt act or affirmative act on the part of your petitioner in violation of said temporary injunction."

They are further preserved and urged in petitioner's motion for rehearing filed in said Court (R. pp. 311-321).

Petitioner contends that he has been denied due process of law guaranteed to him by the Constitution of the United States by his ordered incarceration for thirty days in that there is no evidence whatsoever to support his conviction for an alleged criminal contempt, and that the action of the 116th District Court seeking to deprive petitioner of his liberty for thirty days is a denial of the equal protection of the laws in that the same court licenses and sanctions the alleged acts for which petitioner has been held in criminal contempt for other persons similarly situated upon the payment of a stipulated fee, as is demonstrated by the release orders found on pages 294-295 of the Statement of Facts.

4. The cases believed to sustain said jurisdiction of the Supreme Court of the United States are:

"*Bessette* v. *W. B. Conkey*", 194 U. S. 324, 48 L. Ed. 997, wherein it is held that the Supreme Court of the United

States has jurisdiction to review by certiorari convictions for contempt; also "*Michaelson* v. *United States, ex Rel C., St. P., M. & O. R. Co.,*" 266 U. S. 42, 69 L. Ed. 162; "*Cooke* v. *United States,*" 267 U. S. 517, 69 L. Ed. 767.

"*Tinsley* v. *Anderson*", 171 U. S. 101, wherein it is held that the Supreme Court of the United States has jurisdiction to entertain an appeal from the decision of a state court denying a petition for writ of habeas corpus where appellant is found guilty of contempt of court;

"*Yick Wo* v. *Hopkins*", 118 U. S. 356, wherein it is held that the Supreme Court of the United States has jurisdiction to entertain an appeal from the decision of a state court on the ground that an appellant is deprived of the equal protection of the laws as guaranteed by the Constitution of the United States.

The Supreme Court of Texas in its opinion states that it would not consider the contention raised that there was no evidence whatsoever to support the conviction for contempt and would not consider the constitutional questions presented. The Court used the following language:

> "Those points questioning the evidence or the motives and purposes back of the proceeding will not be dealt with."

The decision of the Supreme Court of Texas is contrary to the decision of the Supreme Court of the United States in the case of "*Gompers* v. *Buck's Stove & Range Company,*" 221 U. S. 418, 55 L. Ed. 797, wherein it was held that in contempt proceedings the defendant is "presumed to be innocent". The Court further said "he must be proved to be guilty beyond a reasonable doubt". In the instant case petitioner contended that there was no evidence whatsoever to support his conviction for contempt and the Supreme Court of Texas failed and refused to consider such contention. Due process, it is submitted, carries with it

more than the mere form of a hearing and the evidence to convict must be more than a mere preponderance, and in order to sustain a conviction must be "beyond a reasonable doubt," and in this case it is earnestly and sincerely submitted that there is no evidence whatsoever establishing any connection of the petitioner with the alleged acts complained of.

The judgment by the Supreme Court of Texas is a final judgment and by the highest court in the State of Texas in which a judgment could be had and involves a decision of an important Federal question of substance contrary to the applicable decisions of the Supreme Court of the United States in the above mentioned Gompers decision, the case of *"Cooke* v. *United States"*, 267 U. S. 517, 69 L. Ed. 767; *"Sinclair* v. *United States"*, 279 U. S. 749, 73 L. Ed. 938: *"Clark* v. *United States"*, 289 U. S. 1, 77 L. Ed. 993; and *"Michaelson* v. *United States, ex Rel. C., St. P., M. & O. R. Co."*, 266 U. S. 42, 69 L. Ed. 162, in all of which cases the court has held that on criminal contempt proceedings the presumption of innocence prevails and proof of guilt must be established beyond a reasonable doubt, while in the instant case the Supreme Court of Texas has expressly refused to consider the evidence on the contention that there was no evidence whatsoever to support the conviction.

Statement of the Case

The statement in the preceding petition under paragraph 1 p. 1) is hereby adopted and made a part of this brief.

In addition, attention is directed to the record evidence which conclusively establishes beyond a reasonable doubt that the petitioner was in no wise connected with the alleged acts for which he has been found guilty and ordered incarcerated for thirty days. Petitioner respectfully rep-

resents as a fact that there is not a scintilla of evidence in the entire record that establishes or suggests that A. S. Genecov in any wise released any of the salt water in question and caused any pollution of any stream. The contrary is definitely and positively established by the only witnesses, M. F. Granville and Roy Morgan, produced by the State.

M. F. Granville, on cross-examination, specifically testified as follows (R. 106-107):

> "Q. The question is you are around those connections every day?
> "A. We make them all about twice a week.
> "Q. Did you at any time see Mr. Genecov or Mr. Roosch around those connections?
> "A. I saw Mr. Genecov—not this time——
> "Q. I mean, during these times that are alleged in the motion?
> "A. No, I don't think I saw them.
> "Q. You saw no one operating those valves?
> "A. No.
> "Q. So far as you know, your man or someone else could have opened it?
> "A. I know my man did not.
> "Q. You just considered he didn't—of your own knowledge, you don't know—you were not there when he was there—and you did not see Mr. Genecov or Mr. Roosth or any agent of the Roosth Genecov Production Company around those valves at any time?
> "A. No, I have not seen them—I could not say that they did."

His testimony, "*No, I have not seen them—I could not say that they did*", is without contradiction.

Roy Morgan, the other representative of the so-called Salt Water Control Board, on cross-examination also testified that he had not at any time ever seen A. S. Genecov or Sam Roosth release any water or break any seal. His testimony on this point is as folows (R. 171-172):

"Q. You say there are not? During the period from March, 1944, through November 5, 1944, you say you were on those leases and at those pits about twice a week.

"A. I could not give the dates. I have been on them twice a week.

"Q. During that period—by the way, you are acquainted with Mr. Roosth?

"A. No, sir.

"Q. Are you acquainted with Mr. Genecov?

"A. No, sir.

"Q. Have you seen either of those two gentlemen on those leases, or near those pits, have you ever?

"A. No, sir.

"Q. Have you ever seen one of them releasing any water from any one of those pits, or breaking a seal?

"A. No, sir.

"Q. Have you seen anybody breaking a seal on those pits?

"A. No, sir.

"Q. Have you seen anybody remove a wheel?

"A. No, sir."

The petitioner voluntarily was called by the defendant and on direct examination emphatically testified and unequivocally stated that he had not authorized or instructed or permitted the release and discharge of any salt water pit on any lease operated and controlled by the Roosth & Genecov Production Company on any of the days or during any of the period charged in the motion for contempt (R. 214-217).

A judgment wholly unsupported by evidence, it is respectfully submitted, is a nullity and of no force and effect and void.

A review of the evidence from the beginning to the end fails to disclose a single word of testimony even casting an inference that the petitioner was guilty of any act of contempt, or was at any time in or near the leases and wells and salt water pits in question. On the contrary, both of

the witnesses for the State unequivocally testified that the petitioner was not present and that he was never seen to commit any of the acts complained of.

That the petitioner has been rankly discriminated against and denied the equal protection of the laws by the 116th District Court is conclusively demonstrated by the court's express release orders through its appointed so-called Salt Water Control Board, permitting other parties similarly situated with petitioner to pollute the streams in east Texas by the discharge of salt water (the very alleged acts with which the petitioner has been charged). Such release orders are found in the Record pages 204-207, and are Exhibits 51, 52 and 53 found on pages 294 through 295, of the Record.

Specification of Errors

1. The Supreme Court of Texas erred in refusing to consider the record evidence in order to ascertain whether such evidence established petitioner's guilt of criminal contempt beyond a reasonable doubt.

2. The Supreme Court of Texas erred in not holding that the record evidence wholly failed to establish petitioner's guilt of criminal contempt.

3. The Supreme Court of Texas erred in not holding that petitioner was denied due process of law as guaranteed by Federal constitution.

4. The Supreme Court of Texas erred in refusing to consider petitioner's contention that he was being denied the equal protection of the laws as guaranteed by the Federal constitution.

5. The Supreme Court of Texas erred in not holding that petitioner was denied the equal protection of the laws as guaranteed by the Federal constitution.

ARGUMENT

Summary

The record evidence as hereinabove demonstrated in the statement of the case conclusively showing that there is no evidence whatsoever in any manner or way connecting petitioner with the alleged acts for which he was convicted of criminal contempt (R. 106-171), and his own testimony definitely showing that he did not do or perform such alleged acts individually and that he expressly directed the employees of the Roosth & Genecov Production Company not to do and perform such alleged acts, it is manifest that the Texas Supreme Court's refusal to consider the record evidence is a flagrant denial to petitioner of due process of law as guaranteed to him by the Federal constitution. There being no record evidence whatsoever to support petitioner's conviction of criminal contempt, it certainly can not be contended that the evidence established his guilt beyond a reasonable doubt as required by due process of law, and the Supreme Court of Texas erred in not so holding.

The record evidence, as demonstrated in the preceding statement of the case and as found on pages 204-207 of the Record, conclusively showing that other persons similarly situated as petitioner, upon the payment of a fee, were authorized to do and perform the very acts for the alleged performance of which the petitioner herein is sought to be convicted of criminal contempt, such conviction is, therefore, a manifest denial to petitioner of the equal protection of the laws and the Supreme Court of Texas erred in not so holding.

POINT 1

In order for a conviction for criminal contempt to stand, the evidence must establish guilt beyond a reasonable doubt, and where there is no evidence whatsoever even tending to establish guilt, a person so convicted has been denied due process of law as guaranteed by the federal constitution, and particularly so when the state court of last resort, in affirming such conviction, expressly refuses to consider the record evidence establishing the convicted person's complete innocence (Germane to Errors Relied On 1-3).

In support of this point, we cite the following cases:

"Gompers v. *Buck's Stove & Range Company"*, 221 U. S. 418, 55 L. Ed. 797;

"Cooke v. *United States"*, 267 U. S. 517, 69 L. Ed. 767;

"Michaelson v. *United States, ex Rel. C., St. P., M. & O. R. Co.,"* 266 U. S. 42, 69 L. Ed. 162;

"Sinclair v. *United States"*, 279 U. S. 749, 73 L. Ed. 938;

"Clark v. *United States"*, 289 U. S. 1, 77 L. Ed. 993;

"Ex Parte Landry", 144 S. W. 962.

Each of the foregoing cases expressly holds that the presumption of innocence obtains in criminal contempt proceedings and that guilt must be established by evidence beyond a reasonable doubt and that otherwise due process of law is denied.

In the Gomper decision by the Supreme Court of the United States, the Court held as follows:

> *"It is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and can not be compelled to testify against himself."* (Italics ours.)

This rule was adopted by the Court of Criminal Appeals in Texas, the State court of the last resort in criminal cases,

in the case of "Ex Parte Landry", 144 S. W. 962, citing voluminous authorities:

> "A criminal contempt is directed against the dignity of the court and as well against the majesty and dignity of the law (citing authorities). It is further laid down, and may now be said to be the settled law, that the rules of evidence applicable to the proceedings to punish for contempt are also those of criminal law, mere preponderance of the evidence being insufficient to convict the accused; but, in accordance with the general rule in criminal cases, proof of the alleged defense is required beyond a reasonable doubt (citing cases). It is also now the settled rule that every presumption and intendment of innocence is to be held favorable to the party charged with contempt."

The Supreme Court of Texas in the case at bar refused to follow this established principle and expressly stated in its opinion that it would not consider the record evidence in determining whether petitioner had been afforded due process of law. Clearly, in order to determine if the evidence established guilt beyond a reasonable doubt, as is necessary to determine if due process has been afforded, it was necessary to review and consider the record evidence to ascertain if there was any evidence establishing guilt beyond a reasonable doubt. Certainly, the mere formality of a hearing is not due process of law. Clearly, a mere hearing after notice and an opportunity to be heard, at which no legal, competent evidence was introduced and at which the evidence does not show beyond a reasonable doubt that a party has been guilty of the acts charged, would not constitute due process of law. The presumption of innocence and the discharge of the burden of overcoming that presumption of innocence by proving petitioner's guilt beyond a reasonable doubt is as much an element of due process as notice of the hearing, and we earnestly insist that in the record here presented this element of due process is

wholly lacking. All of the witnesses used by the State stated that the petitioner was not seen on the leases nor had anyone been seen releasing or discharging salt water or committing the alleged act of contempt (R. 107 and 171).

Without the presumption of innocence and the overcoming of the same by evidence establishing guilt beyond a reasonable doubt, there is an utter want of the constitutional guaranty of "due process of the law of the land". Be the citizen ever so humble, wicked or criminal, he still is entitled to the guaranteed "due process of law" before his life, liberty or property can be legally taken. This guaranty serves as his shield against illegal prosecution, usurpation of power, arbitrary and capricious conviction for contempt unsupported by any evidence whatsoever and against discrimination by a trial court.

In Texas the Court of Criminal Appeals, the State court of last resort in criminal cases, had occasion in several cases to consider the quantum of evidence required to support a conviction of violation of the Anti-Pollution Statute of Texas, Article 698b, Penal Code of Texas (the very statute which deals with the alleged acts of pollution with which petitioner has been charged, and in each of the decisions, after reviewing the evidence, held that the evidence was insufficient to support the conviction. These cases are "*Myers* v. *State*", 184 S. W. 2d 924, and "*Bell* v. *State*", 99 S. W. 2d 40. In the case at bar there was no evidence whatsoever to support the conviction for the alleged acts of pollution. To deny petitioner a review and a consideration of the contention that there is no evidence whatsoever to support his conviction when in fact due process requires establishing guilt beyond a reasonable doubt, is to deny relief from an arbitrary, capricious and unwarranted judgment and a deprivation of liberty without due process of law.

POINT 2

Where a lower state court, upon the payment of a fee, licenses, authorizes and permits certain persons to violate a state penal statute and convicts another person similarly situated for criminal contempt for allegedly performing the same, identical acts, such other person is denied the equal protection of the laws as guaranteed by the federal constitution and the Supreme Court of Texas erred in not so holding.

The record conclusively discloses that the 116th District Court, through its usurpation of power in creating the so-called Salt Water Control Board, authorized the issuance of the release orders by said Salt Water Control Board permitting the discharge of salt water by parties similarly situated with petitioner and other than him, and the same District Court, in the criminal contempt proceeding, holds this petitioner guilty of contempt for allegedly committing the same, identical acts licensed and sanctioned to others. Ranker discrimination against petitioner and denial of equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States can not be conceived. The 116th District Court as to petitioner finds him guilty of contempt for the alleged commission of acts licensed and sanctioned to others identically situated with the petitioner.

Conclusion

There being no evidence to support petitioner's conviction for contempt and there certainly being no evidence of guilt beyond a reasonable doubt, petitioner has been denied due process of law and his conviction should be reversed

Equal protection of the laws carries with it the right of all persons similarly situated to be treated alike by the sovereignty, including like treatment by a State district

court. The conviction of petitioner for alleged acts of contempt, without any evidence whatsoever to support the same, and permitting persons similarly situated to commit identical alleged acts, is a rank discrimination and a denial of due process of law, and a denial of the equal protection of the laws.

WHEREFORE, petitioner prays the granting of the petition for writ of certiorari and upon hearing by this Court, a reversal of the judgments of the courts below, and for such orders and judgments in the premises as to the Court may seem just and proper.

Respectfully submitted,

GABRIEL HAWKINS GOLDEN,
JOEL MANUEL HOPPENSTEIN,
Counsel for Petitioner.

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